ORIGINAL

No. 83-6430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES DUPREE HENRY,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth and Fourteenth Amendments and the Court's decision in Enmund v. Florida permit the imposition of a death sentence for an offense involving an accidental death which happened during the commission of a felony where no lethal force was employed?

2. Whether a capital sentencing jury in Florida, consistently with the Eighth and Fourteenth Amendments, may be permitted to base a death verdict solely upon nonstatutory aggravating factors where no other procedures were employed that would substitute for the finding of a statutory aggravating circumstance?

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Petitioner prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit (Unit B), filed December 13, 1983.

CITATION TO OPINIONS BELOW

The opinion of the court of appeals that is the subject of this petition is reported as Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983)(Unit B) and is set out in Appendix A hereto. Rehearing en banc was denied on January 25, 1984 and is not yet reported. A copy of the Order denying rehearing is set out as Appendix B hereto. The prior opinions of the court of appeals are reported as Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) (Unit B), reh. en banc den., 669 F.2d 731 (5th Cir. 1982) (Unit B), cert. gtd and remand, 457 U.S. 1114 (1982), judgment adhered to on remand, 686 F.2d 311 (5th Cir.)(Unit B), cert. gtd and remand, ___U.S.___, 103 S.Ct. 3566 (1983). The opinion of the district court is unreported. The opinion of the Supreme Court of Florida on direct appeal is reported as Henry v. State, 328 So.2d 430 (Fla. 1976) and on state post-conviction as Henry v. State, 377 So.2d 692 (Fla. 1979).

JURISDICTION

The judgment of the court of appeals below was entered on December 13, 1983 and petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on January 25, 1984. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1973), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" and Section 782.04, Florida Statutes entitled "Murder." Due to their length, the statutes are set out in Appendix C hereto.

STATEMENT OF THE CASE

A. The Offense

Mr. Henry was charged with first degree murder involving the death of Z.L. Riley. The death occurred during the commission of a robbery at Mr. Riley's home in March of 1974. Mr. Riley's apartment had been ransacked and he had been laid on his bed and tied. The cause of death was, essentially, that the deceased had swallowed his tongue because a rag placed around his mouth as a gag had apparently pushed against his tongue while he was lying on his back. The medical examiner analogized the cause of death to an epileptic victim swallowing his tongue during a seizure (Record at 836). The deceased also had some bruises and lacerations that were unconnected to the cause of death, were "quite superficial" and which were unclear as to the time of their occurrence (Record at 828, 838, 842). Mr. Henry was arrested three days later (Record at 850) and gave a custodial statement to the police in which he admitted the robbery of Mr. Riley, though stating that he did not know that Mr. Riley had died until being told by police (Record at 66).

B. The Trial

Mr. Henry was indicted for first degree murder and trial by jury began on June 24, 1974. Though the indictment charged premeditated murder (Record at 154), in accord with Florida law

such an indictment included the theory of felony murder, and the prosecution proceeded on that theory. The jury rendered a general verdict of guilty and the case proceeded to the sentencing trial on the same day. During the sentencing trial, the prosecution was allowed to admit evidence that Mr. Henry had resisted arrest by shooting the arresting officer and was permitted to present evidence of criminal charges made against Mr. Henry, though Mr. Henry had entered pleas to less severe offenses. Because this evidence involved offenses for which there had been no convictions entered, defense counsel objected to the introduction of the evidence as not being encompassed by the statutory list of aggravating circumstances. The judge overruled these objections because it was his intention to allow "generally charged" evidence. Mr. Henry presented testimony of friends concerning his character and helpfulness (Record at 1017-26).

The case was then submitted to the jury. The trial judge charged the jury as follows:

> [Y]ou will render an advisory sentence to the Court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist for you to recommend the Death Penalty or Life Imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following:
>
> [listing of the aggravating factors as they are set out in the statute]
>
> In considering mitigating circumstances, you shall consider all factors which are mitigating including but not limited to the following:
>
> [listing of the mitigating factors as they are set out in the statute]
>
> Your advisory sentence must be the recommendation of a majority of your number. That is, seven or more of you must agree upon the recommendation you submit to the Court.

(Record at 1035-39).

During its deliberations the jury inquired whether "there [is] any way of a prisoner getting out of prison in less than 25 years, some way other than parole when sentenced to life imprisonment." (Record at 1039). The judge reread the instruction that

one sentenced to life imprisonment is "required to spend no less than 25 calendar years before being eligible for parole...." Id.

By a 7 to 5 vote the jury reached an advisory verdict recommending the death sentence (Record at 1041). The judge immediately imposed the death sentence (Record at 1048).

C. The Direct Appeal.

Mr. Henry appealed his conviction and death sentence to the Supreme Court of Florida. In a per curiam, 4 to 2 decision the Florida Supreme Court upheld Mr. Henry's conviction and death sentence. In ruling upon the death sentence the court quoted the trial judge's findings of fact and concluded that "[w]e find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause." Henry v. State, 328 So.2d 430, 432 (Fla. 1976). Rehearing was denied as was a petition for a writ of certiorari. Henry v. Florida, 429 U.S. 951 (1976), reh. den., 429 U.S. 1124 (1977).

D. The Post-Appeal Proceedings

Mr. Henry filed a motion to vacate his judgment and sentence, pursuant to Fla.R.Crim.P. 3.850, in the state trial court. This motion was denied on November 19, 1979 and affirmed by the Florida Supreme Court on November 27, 1979. Henry v. State, 377 So.2d 692 (Fla. 1979).

Mr. Henry then, on November 27, 1979, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court, Middle District of Florida. By order filed February 14, 1980 (Record at 1172) the district court granted the petition for writ of habeas corpus insofar as the death sentence and ordered that a new penalty trial be held, and denied relief as to all other grounds. Respondent Wainwright then appealed, and Mr. Henry filed a cross-appeal. The court of appeals affirmed the district court's order granting the writ of habeas corpus, Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) (Unit B), but because of its disposition, did not reach Mr. Henry's cross-appeal. The Court granted certiorari and remanded the cause for further consideration in light of Engle v. Isaac, 456 U.S. 107 (1982). Wainwright v. Henry, 457 U.S. 1114 (1982). The previous judgment was adhered to on remand by the court of

appeals. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982) (Unit B). Wainwright again applied for certiorari. The Court granted certiorari and remanded for further consideration in light of Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983). Wainwright v. Henry, ___U.S.___, 103 S.Ct. 3566 (1983). On December 13, 1983, the court below issued its opinion reversing the district court's order insofar as it had granted the writ of habeas corpus and affirmed the denial of habeas corpus relief on the issues raised by Mr. Henry on his cross-appeal. Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983) (Unit B).

REASONS FOR GRANTING THE WRIT

I.

THE EXTREME PENALTY OF DEATH IS IMPERMISSIBLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS FOR AN OFFENSE INVOLVING AN ACCIDENTAL DEATH THAT OCCURRED DURING A FELONY WHERE NO LETHAL FORCE WAS EMPLOYED.

Henry's case involves an accidental death where no lethal force was employed, but a conviction for first degree murder, and death sentence because that death occurred during the progress of a felony. The death was accidental because it resulted from quite attenuated means. The victim had been bound, laid on his bed and a piece of cloth had been tied around his mouth as a gag. These circumstances logically indicate an apparent attempt to avoid lethal force by an attempt only to restrain him during the time that the taking would be accomplished. However, the gag apparently pushed up against the victim's tongue. This caused the death when in essence the deceased, an elderly man, swallowed his tongue -- the medical examiner analogized the cause of death to an epileptic seizure victim swallowing his tongue.[1]

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[1] Though the deceased also had some bruises and laceration, they had no connection with the death and since it is unclear when they may have actually occurred, they may have happened in the process of tying up the deceased. The lacerations on the deceased's neck referred to by the lower court were, as characteried by the medical examiner, "quite superficial," had nothing to do with the cause of death, and were made by one or two "scratches" (Record at 828, 838, 842).

Accordingly, the facts of this case strongly indicate that the death was unintended. The attenuated means by which the death occurred do not logically support an intent to cause death and more strongly demonstrate that the death was wholly unintended and accidental.[2]

The question thus squarely presented by this case is whether a death sentence may be imposed consistently with the eighth and fourteenth amendments for an offense involving an accidental death where no lethal force was employed or intended. This question thus concerns the Court's holding in Enmund v. Florida, 458 U.S. 782 (1982) where the death sentence was held invalid for an armed robber who did not intend that a life be taken where a co-perpetrator shot and killed the victim.

Under Florida law, the state of mind of the defendant is immaterial in a prosecution under a theory of felony murder. As the Florida Supreme Court explains:

> In its most basic form, the historic felony murder rule mechanistically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.

Adams v. State, 341 So.2d 765, 768-69 (Fla. 1977) (emphasis supplied, footnotes omitted).

It is quite evident that petitioner was convicted under this "mechanistic" rule for an "accidental killing" where state of mind is immaterial. As the decision below acknowledges neither the indictment, the jury charge nor the verdict required any finding as to state of mind. 721 F.2d at 995; App 6a.[3] The

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[2] Binding and gagging even more than not showing an intent to kill, actually more logically show an intent not to kill. Restraining someone is contradictory to an intent to kill that person. In fact Mr. Henry's custodial statement to the police indicated that he thought the victim was alive when he left the apartment, and that he did not even know that he had died until he was told by the police (Record at 66).

[3] Although the indictment charged first degree murder "from a premeditated design," under Florida law such an indictment is held to charge both premeditated murder and felony murder. Knight v. State, 338 So.2d 201 (Fla. 1976). The jury was instructed on both theories and returned only a general verdict of guilt that did not specify the theory upon which it relied.

prosecution plainly proceeded on a theory of felony murder.[4] There has never been a finding in the state courts at any level that petitioner intended that a human life be taken.

The death sentence was imposed "regardless of whether [Henry] intended or contemplated that life would be taken," Enmund v. Florida, 458 U.S. at 801; that is, regardless of whether the offense involved only an "accidental killing during a felony." For purposes of Florida felony murder all that mattered was that the death occurred while a felony was being committed; nothing more was required. And that "mechanistic" rule is all that supports the conviction and death sentence. It is the legal fiction that made this offense first degree murder -- intent had no role in the determination. Mr. Henry's state of mind -- his "moral guilt," id. -- was "beside the point," id. at 788, in the imposition of the death sentence upon Mr. Henry.

State of mind constitutionally cannot be "beside the point" under the Court's holding in Enmund. This case falls squarely within the Enmund reasoning for there is no relevant distinction between it and the situation presented in Enmund. The only difference between Mr. Henry's case and Mr. Enmund's case is causation, not mental state or culpability. That difference is, however, constitutionally irrelevant. For purposes of the death penalty intent is the relevant factor, not causation: "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally'." Enmund, 458 U.S. at 798 (quoting H. Hart, Punishment and Responsibility 162 (1968)). Mr. Henry was treated for purposes of the death penalty the same as if he had intentionally caused the death. This mechanical treatment under the felony murder rule was precisely the constitutional infirmity found by the Court in Enmund.

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[4] For example, the prosecutor argued that he needed to show the other wounds on the deceased, even though admittedly they were unrelated to the death, in order to establish the state's theory of forceful taking for the robbery to support its felony murder theory. In closing argument, though initially mentioning the Florida law regarding both theories, the prosecutor summarized the evidence and expressly concluded: "Ladies and gentlemen, that is felony murder in the first degree" (emphasis added) (Record at 973).

The Court's own judgment that the eighth amendment did not permit the imposition of the death penalty upon Enmund, 458 U.S. at 797, applies with equal force to Mr. Henry's death sentence. Enmund was a participant in the "serious crime" of armed robbery, id., and thus under Florida law he and his fellow armed robbers "did commit murder," id. at 798. However, they were "subjected to the death penalty only because they killed as well as robbed." Id. The question thus was "not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct." Id.

The same is true for Mr. Henry. Under the same legal theory as applied to Enmund, Mr. Henry "did commit murder." He was subjected to the death sentence only because a death happened during the felony. "The focus must be on his conduct," 458 U.S. at 798, not upon a mechanical rule. The Court "insist[s] on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). Just as in Enmund, the record here "does not warrant a finding that [Mr. Henry] had an intention of ... facilitating a murder." 458 U.S. at 798. However, causing harm intentionally must be punished more severely than causing the same harm unintentionally. Id. Mr. Henry did not intend to kill and did not employ lethal force; and though his actions caused the death, there was no intent to do so -- the record strongly indicates the opposite, the intent only to restrain. Yet the state, utilizing its legal fiction of felony murder as it had done in Enmund, treated Mr. Henry the same as if he had intentionally caused the death. For the reasons expressed in Enmund, "[t]his was impermissible under the Eighth Amendment." Id.

Likewise, the social purposes of the death penalty that were examined in Enmund, retribution and deterrence, do not support the death sentence in this case. The Court was "quite unconvinced" that the death penalty would deter someone who commits a robbery with no intent that a life will be taken: "It seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" Enmund, 458 U.S. at 799 (quoting Fisher v. United

States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). Deterrence would seem even less likely for an "accidental killing during a felony" where lethal force is not employed. One who intends only to rob, and intends that the victim not be killed, is hardly any more likely to be deterred from the resulting accidental death, than is the robber such as Enmund who sends his co-perpetrators into a house armed with loaded weapons to forcefully take property.

As to the second social purpose of the death penalty, retribution, the justification depends upon the defendant's "intentions, expectations, and actions." Enmund, 458 U.S. at 800. "American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to 'the degree of [his] criminal culpability.'" Id. (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)). Where the defendant has no intent to cause the resulting death, his "moral guilt" is not the same as one who intentionally causes the same harm. "Criminal culpability" is plainly different, and without intent, retribution is not legitimately served by the death penalty.

"For purposes of imposing the death penalty, [Mr. Henry's] criminal culpability must be limited to his participation in the robbery." His punishment must be tailored to his "moral guilt," which must in turn depend upon his intent. Culpability focuses on actual intent, not upon the fictional intent of felony murder. Mr. Henry's actual intent was no different than that of a robber and his moral guilt must be judged for purposes of the death penalty only upon that basis. As in Enmund, however, the death penalty was imposed upon Mr. Henry "regardless of whether [he] intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. And as in Enmund, a death sentence imposed under such circumstances, violates the eighth and fourteenth amendments.

A significant eighth amendment question in thus presented by this case. The Court must resolve the question, not only because Mr. Henry's life depends upon its resolution by the Court, but further because the court below has misperceived and misapplied

the Court's holding in Enmund. The court of appeals holds that Enmund approved the death sentence for any person who "participated in the killing." 721 F.2d at 995; App. 5b. Thus, since Mr. Henry had "no accomplice," the court held, "Enmund is no bar to the death sentence here." Id.[5] At the same time the court did not disagree that Henry "did not intend that the victim die." Id. The court thus upheld the death sentence because Mr. Henry forcibly bound and gagged the deceased and because he acted alone. The death sentence was upheld "regardless of whether [Henry] intended or contemplated that a life would be taken." Enmund, 458 U.S. at 801.

In a later decision the court of appeals explained that it does not believe that Enmund applies where though the defendant lacks intent to kill, he actually participates in the acts that lead to death. The court narrowly restricts Enmund exclusively to murders with accomplices. The court explained:

> The crime of felony murder may be applied in two different situations. First, it may be used to impute the crime of murder to a participant in the felony who took no part in the actual murder. This type of felony murder will be referred to as accomplice culpability. Second, a participant in the commission of the felony who lacked the requisite intent to murder but did not take part in the actual killing may be convicted of murder. In this case, the intent to commit the felony is imputed to the murder so that a showing of malice becomes unnecessary. Because we are dealing here with this latter type of felony murder, the Enmund decision is not controlling.

Drake v. Francis, ___F.2d___, No. 83-8047, slip op. at 16 (11th Cir., Feb. 29, 1984).

The restrictive view of Enmund being followed by the court of appeals, overlooks the Court's central holding. For purposes of the death penalty the focus must be on culpability and culpability is measured by intent, by moral guilt. Where such intent is no greater than that for robbery, the death sentence cannot constitutionally be imposed. The per se rule of the lower

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[5] The court relied upon its decision in Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983). However, Ross' challenge was only that there had been no finding that he had intended to cause death; he did not claim that the evidence showed a lack of intent. Id. at 1532. The panel of the court of appeals found, however, that the record demonstrated that Ross "possessed an intent to kill" and thus rejected his claim. Id. at 1533. Ross thus is a case that is different from Henry.

court focuses away from that intent -- intent is "beside the point" -- in favor of a mechanical rule that upholds the death sentence even though and regardless of whether the defendant had no intent to cause or facilitate the killing. The lower court states no justification for such a broad holding, nor, as discussed above, could it do so for neither deterrence nor retribution come into play. The logical result of the court's reasoning, eschewing as it does a consideration of intent in favor of causation, would sanction a death sentence for any homicide so long as the defendant participated in acts that contributed to the death, no matter how unintended. Causation is, however, an improper focus. After all, Earl Enmund could be said to have "caused" his victim's death by planning the armed robbery and sending his co-perpetrators into an occupied house with loaded weapons for the purpose of forcibly taking property from the victims. The lower court has thus misread the holding of Enmund.

A significant question regarding the eighth amendment is therefore presented for the Court's review. The lower courts have misconstrued the Court's holding in Enmund and only the Court can correct that misconstruction. Mr. Henry's case presents the appropriate case upon which to review the question. The facts of Mr. Henry's case show an accidental death and a death sentence imposed regardless of the lack of intent, premised solely upon the fictional and "mechanical" felony murder rule. Because Mr. Henry's case presents the question in narrow focus both factually and legally and because the Court is the only court that can grant relief, the Court must grant certiorari.

II

THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BECAUSE MR. HENRY'S JURY WAS PERMITTED TO BASE A DEATH VERDICT SOLELY UPON NONSTATUTORY AGGRAVATING FACTORS AND BECAUSE THERE WERE NO OTHER CONFINEMENTS OF THE JURY'S SENTENCING DISCRETION TO SUBSTITUTE FOR THAT "CONSTITUTIONALLY NECESSARY" SAFEGUARD.

Mr. Henry's capital sentencing proceeding lacked the one procedural safeguard deemed constitutionally indispensible by the Court: a finding of at least one statutory aggravating circumstance. "[A] death sentence may not rest solely on a nonstatutory aggravating factor ...." (original emphasis) Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3433 (1983) (Stevens, J., concurring) (citing Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2742-2743 (1983)). Moreover, there were no other procedures in Mr. Henry's case that would serve as "checks on arbitrariness," Pulley v. Harris, ___U.S.___, 104 S.Ct. 871, 880 (1984), so as to substitute for that missing safeguard. The capital sentencing trial was completely open-ended -- the jury was told to consider anything in aggravation specifically without limitation, was not required to find aggravating factors beyond a reasonable doubt or even told that the state bore the burden of proof, and inadmissible evidence was introduced.

An important eighth and fourteenth amendment question is presented for the Court's review. The court of appeals below, after twice unanimously holding that the open-ended procedures in Mr. Henry's case directly violated the eighth amendment requirement of regularity in capital sentencing, has relied upon the Court's decisions in Zant and Barclay and extended and misapplied their holdings in a manner that sanctions capital sentencing without procedural safeguards. The breadth of the holding below and the procedures it approves calls for review by the Court, for only the Court can correct the misperception of its precedent.

We will discuss below the lack of any requirement that the jury base its death verdict on a statutory aggravating factor, the lower courts misperception of the role of the jury in Florida capital sentencing, and the unchecked nature of the other procedures employed in Mr. Henry's case.

A. The Jury Was Permitted To Base Its Death Verdict Solely On Nonstatutory Aggravating Factors.

Unlike the juries in Barclay and Zant, Mr. Henry's jury was not told that it was required to find at least one statutory aggravating circumstance before it could issue a death verdict. Henry's jury was told only that it should render a sentencing verdict based on "[w]hether sufficient aggravating circumstances exist or sufficient mitigating circumstances exist, for you to recommend the death penalty or life imprisonment," and that, "[i]n considering aggravating circumstances, you shall consider all factors which are aggravating, including but not limited to, [statutory aggravating circumstances]."

The combined effect of first permitting the prosecutor to present anything in aggravation and urging the jury to consider any of it or indeed anything at all, and second permitting the jury to reach a death verdict without explicitly finding a statutory aggravating circumstance, was to create the substantial risk that the jury's verdict did rest "solely on a nonstatutory aggravating factor," and thus wholly undermine one of the two primary requisites of a valid death sentencing scheme, see Zant, 103 S.Ct. at 2742, for there is simply no assurance that "capital punishment [will] be imposed fairly, and with reasonable consistency" as the eighth amendment requires. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

An underlying premise of the Court's 1976 decisions approving the capital sentencing procedures in Florida, Georgia and Texas and its decisions last term in Barclay and Zant was the role of statutory aggravating factors in narrowing and limiting the unbridled discretion disapproved in Furman. See Pulley v. Harris, 104 S.Ct. at 876-879 (analyzing the procedures approved in the 1976 cases, each of which requires the finding of at least one statutory aggravating circumstance).

In Zant v. Stephens, supra, "the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances." Pulley v. Harris, 104 S.Ct. at 871 (emphasis added). See also Proffitt v. Florida, 428 U.S. 242, 256 (1976) (recognizing that a death sentence would not be upheld solely on

nonstatutory aggravating factors); Barclay v. Florida, 103 S.Ct. at 3426, 3428 (plurality opinion) (same and noting that Proffitt questioned the constitutional propriety of basing a death sentence solely on a nonstatutory aggravating factor); id. at 3430, 3431, 3433 (Stevens, J., concurring) (noting the constitutional necessity of finding at least one statutory aggravating factor).

Accordingly, the one procedural safeguard against arbitrary capital sentencing as required by Gregg v. Georgia, 428 U.S. 153 (1976), is the critical and "constitutionally necessary" finding of a statutory aggravating circumstance -- a procedure by which findings are made pursuant to legislative guidelines that meaningfully narrow the class of convicted murderers upon whom a death sentence may be imposed. See also Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (noting the Court's emphasis upon the need for channelling sentencing discretion by "clear and objective standards" that provide "specific and detailed guidance" in selecting those murders who may be sentenced to death in order to avoid arbitrary imposition of the death penalty). It is the key procedure that distinguishes the current approved capital sentencing schemes from those invalidated by Furman v. Georgia, 408 U.S. 238 (1972).

That procedural safeguard was, however, absent in this case. The juries in Proffitt, in Barclay, and Zant were properly instructed. So too was the jury "properly instructed" in Wainwright v. Goode, ___U.S.___, 104 S.Ct. 378, 383 (1983).[6] The jury in Henry's case was not, however, properly instructed.

B. The Court of Appeals Misapprehended the Critical Role of the Jury in Florida Capital Sentencing.

Mr. Henry's jury vote for a death sentence by the barest of margins, 7 to 5 -- a change of one vote would have meant a life verdict and would have thus changed the entire character of the later proceedings at the trial and appellate levels. It was,

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[6] Also, in Gregg v. Georgia, supra, the Court emphasized the need to provide the juries with "careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit." 428 U.S. at 193. The Court said that any other course would be "virtually unthinkable" Id.

however, this hair-thin death verdict that the court of appeals thought would allow the unlimiting jury instruction in this case.

The opinion below acknowledges precisely the constitutional violation present in this case: "It is impossible to determine what evidence the jury relied on in sentencing Henry to death." 721 F.2d at 994; App. 5a. Though it acknowledged the constitutional error, the court reasoned that the concurring opinion by Justice Stevens in Barclay "did not directly [fn.3] address whether the jury as well as the judge must specifically find a statutory aggravating factor to be present." Id. (citing Barclay v. Florida, 103 S.Ct. at 3433 (Stevens, J., concurring)). In its footnote 3 the court explained that Barclay's jury voted for life imprisonment whereas Henry's jury voted for death and thus concluded that "we cannot discern a reason for invalidating the death sentence here where the sole distinction is that a jury voted for the death penalty." 721 F.2d at 994 n.3; App. 5a (original emphasis). Secondly, the court reasoned that the jury "acts only in an advisory capacity" and therefore it did not matter that the jury was not constitutionally instructed. Id.

The court's reasoning is based upon two glaring misconceptions.

First, the reasoning wholly disregards and undermines the determinative role of the jury in Florida capital sentencing. That disregard is in marked contrast to how the Court views the jury in Florida. In every decision where the Court has reviewed the Florida statute -- from Proffitt to Barclay -- it has emphasized and reaffirmed the jury's crucial role.[7] The Court's view and reliance upon the importance of the Florida jury is in complete accord with how state law treats the jury. The jury is of paramount importance. Florida's capital sentencing system

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[7] See Proffitt v. Florida, 428 U.S. at 249-50 (noting the strict standard of review in Florida where a jury votes for life imprisonment). In Dobbert v. Florida, 432 U.S. 282 (1977) the Court emphasized the "exacting standards of Tedder[v. State, 322 So.2d 908 (Fla. 1975)]" id. at 295-96, that come into effect where a jury votes against the death penalty. The Court again emphasized and relied upon the jury's important role in its decision in Barclay v. Florida, 103 S.Ct. at 3425, 3427, 3428 (plurality opinion) (relying upon the safeguard of the Tedder standard); id. at 3430 & n. 1 (same).

involves a "scheme of checks and balances in which the input of the jury serves as an integral part." Messer v. State, 330 So.2d 142 (Fla. 1976). Thus, "the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice." Chambers v. State, 339 So.2d 204, 209 (Fla. 1976) (England, J., concurring); accord Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) (The jury is "the one institution ... most honored for fair determinations of questions decided by balancing opposing factors."). Accordingly, with regard to the "respective functions of the judge and jury in death penalty cases," the judge's role "is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason." Chambers v. State, 339 So.2d at 208 (England, J. concurring). The jury "represent[s] the judgment of the community as to whether the death sentence is appropriate" in a given case. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); accord, e.g., McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977) (juries are the "conscience of our communities"). In Florida there thus may be "no denigration of the jury's role" in capital sentencing. Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

It is because of the critical importance of the jury's verdict that in order to overrule a life verdict, a death sentence may be imposed only if the "exacting standards of Tedder" are met. Under that strict standard a death sentence may not be imposed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d at 910. Thus, "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d at 1095.[8]

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[8] Consistent with the Tedder standard and the important role given to the jury in Florida capital sentencing, the Florida Supreme Court views errors occurring in the jury proceedings more strictly than errors in a sentencing judge's findings. While it applies a harmless error rule to errors it finds in a judge's sentencing order (this was the situation in Barclay v. Florida, supra), the Florida court does not apply a harmless error rule to

Accordingly, what the decision below misses in its derogation of the Florida jury, is the drastic difference that a life verdict would have meant in Henry's case at both the trial and appellate levels of the Florida courts. The razor-thin 7 to 5 jury verdict for death meant that the Tedder standards did not have to be met in imposing the death sentence. The trial judge was not required to find by clear and convincing evidence that no reasonable person could differ over the necessity of the death sentence. See Barclay v. Florida, 103 S.Ct. at 3428 (plurality opinion) (recognizing the rule "prohibiting the trial judge from overriding" a jury's life verdict unless the Tedder test is met). Likewise, the Florida Supreme Court was not required to and did not give its heightened scrutiny to Henry's death sentence. See id. at 3428 (recognizing the stricter review employed by the Florida Supreme Court where death is imposed over a life verdict); id. at 3430 (Stevens, J., concurring) (noting that the Florida court "will scrutinize with special care any death sentence that is imposed after a jury has recommended a lesser penalty.").

The jury in Florida does matter very much and the lower court's disparagement of the jury's role overlooks the fact that the jury's verdict critically shapes both the judge's and appellate court's subsequent findings and review. Had Henry's jury voted for life, the exacting Tedder standards would have come into play with the likely result that the death sentence would not have been imposed or if it had been it would not have been affirmed. And it is a very real likelihood that had the jury been properly instructed it would have returned a life verdict. This was the finding of the district court after review

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errors in the jury proceedings. See Maggard v. State, 399 So.2d 973 (Fla. 1981) (reversing for a new penalty trial though upholding a statutory aggravating factor and finding none in mitigation, because an error occurred "during the [jury] sentencing hearing").

of the entire record.[9] Such likelihood is further reinforced by the marginal 7 to 5 vote of Henry's jury; a change of even one vote would have meant life imprisonment.[10]

The court of appeals decision thus critically misperceived the harm to Henry from the inadequate jury charge. (The disparagement of the jury by the lower court not only was inconsistent with Florida law discussed above, but it raises the question presently pending in the Court in Spaziano v. Florida, No. 83-5596 (cert. granted Jan. 9, 1984) regarding the extent to which a judge's sentencing decision can be substituted for the jury's decision consistently with the federal Constitution).

Second, the decision below misses the pivotal difference between Barclay and Henry. Barclay's jury was properly instructed on the requirement of finding a statutory aggravating circumstance and Henry's jury was not. It thus widely misses the mark to reason that the "sole distinction" between Henry and Barclay is that Barclay's jury voted 7-5 for life. The decision is thus premised on faulty logic that since Barclay was not harmed with a life verdict, then Henry with a death verdict could not be harmed. Of course, however, Henry was harmed by the death verdict that was premised on constitutionally inadequate jury instructions. The reasoning of the lower court is thus based on a further misconception.

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9 The district court found that "had the jury been properly instructed and guided at the sentencing hearing, it is entirely possible that its recommendation might not have been for the imposition of the capital penalty." (Record at 1189). There are a number of factors that militate in favor of and would support a life verdict by the jury, including the mitigating character evidence presented by Henry at trial and, perhaps more importantly, the nature of the offense as involving an accidental, unintended death (see point I, supra).

10 See Rose v. State, 425 So.2d 521 (Fla. 1983) (6 to 6 vote means life); Harich v. State, 437 So.2d 1082 (Fla. 1983) (same). It is also interesting to note that under the holdings of both Rose and Harich, Henry's jury was improperly instructed under state law that a majority verdict was required for a life sentence.

C. There Was No Other Confinement of the Jury's Sentencing Discretion

The jury in Henry's case was not constitutionally instructed. The sentencing process lacked the key eighth amendment safeguard that has emerged from the evolution of Furman through the Court's decisions in Gregg, Zant, Barclay and Pulley. Henry's jury was not required to find a statutory aggravating circumstance before reaching its death verdict.

Since this "constitutionally necessary" safeguard was absent, it is appropriate to examine the other procedures employed to determine whether they could make up for that omission.[11] In this case it could not . There was simply nothing else in the process by which the jury cast its decisive hairline vote for death that narrowed or confined its sentencing discretion so as to provide a substitute for the safeguard of finding of a statutory aggravating circumstance.

The sentencing proceedings in this case may accurately be characterized as open-ended: (1) the prosecutor was allowed to present any evidence in aggravation without limitation; (2) the jury was permitted and urged to base a death verdict on any of it or indeed anything at all; (3) the jury was not told that the state bore the burden of proving aggravating factors or that aggravating circumstances were required to be proven beyond a reasonable doubt; (4) the aggravating factors were not defined for the jury, they were simply listed from the statute; and (5) as previously discussed, the jury was allowed to base its death verdict solely upon nonstatutory aggravating factors. In short the procedural context presented by Henry involves "permitting the jury to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the jurors might discern ...," Henry v. Wainwright, 661 F.2d 56, 59

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[11] In reviewing the omission of a procedural safeguard from a particular capital sentencing process, the Court has looked at the other procedural protections in the process to determine whether they could adequately substitute for the omitted safeguard. See Pulley v. Harris, 104 S.Ct. at 879, 880 (looking at whether the other California procedures were so lacking as to nevertheless require the omitted proportionality review).

(5th Cir. 1982) (Unit B) (emphasis added), and no guidance to the jury as to how to reach its verdict, i.e. weighing and burden of proof.

There was thus no substitute for the omission of the requirement that the jury find a statutory aggravating factor. For example, had the evidence been properly limited, as required by state law, to only statutory aggravating factors or if the jury had been properly instructed to rely only upon statutory aggravating factors, as also required by state law, then perhaps it might not have mattered that the jury was not told that it was required to find a statutory factor before it could return a death verdict. Under such circumstances the jury's discretion might have been confined by other safeguards. But there were no such other safeguards in this case.

The Court's opinions in both Barclay and Zant emphasize the importance of confining the jury's discretion. In Zant the Court had been told by the Georgia Supreme Court that "a different result might be reached if the failed circumstances [considered by the sentencing jury] had been supported by evidence not otherwise admissible ...." (emphasis added) 103 S.Ct. at 2740-41. The notion that there are some kinds of evidence that are "not ... admissible" in aggravation presupposes the existence of restrictions upon the prosecutor's license to present anything he pleases to the jury at a penalty trial. In Georgia, the evidence was expressly authorized by statute, see 103 S.Ct. at 2747, and the Court therefore began from the premise that "any evidence on which the jury might have relied in this case ... was properly adduced at the sentencing hearing .... [and was] properly before the jury," (Id. at 2748); emphasis added). Stephens' grievance was thus reduced to a claim that "[a]lthough ... the evidence was admissible, ... the trial court's instructions 'may have unduly directed the jury's attention to [it.]'" Id. (Emphasis added). Likewise, in Barclay there was no claim that the evidence on which the sentencing judge relied in making the inappropriate finding of an aggravating circumstance was not properly before the sentencer. "On the contrary, this evidence was properly introduced ...." (emphasis added) 103 S.Ct. at 3427 (plurality

opinion). Once again, as in Zant, "even though, under state law, these factors did not support findings of statutory aggravating circumstances, the information [itself] appears to have been properly before the advisory jury and the judge." (emphasis added) Id. at 3434.

Thus, neither Zant nor Barclay countenances: (1) a death sentence premised upon consideration of evidence in aggravation which has been placed before the sentencer improperly, or (2) the notion that, simply because a State may permit the sentencer to consider nonstatutory aggravating features of a case appearing from properly admitted evidence, it may also open-end the penalty trial completely, so as to license the prosecutor to present anything at all. If this kind of license were contemplated, then the carefully repeated language in Barclay and Zant about "properly admitted" and "admissible" evidence would be altogether out of place, since there would be no such thing as improperly admitted or inadmissible evidence.

The decision below, however, disregards this limiting language of Barclay and Zant, and reasons instead that since Barclay and Zant allow nonstatutory aggravating factors to be considered, they must also at the same time allow admission of such nonstatutory evidence. To hold otherwise, "would create an anomaly" as the panel sees it. 721 F.2d at 994; App. 5a. There is however no anomaly in this -- it is at heart of the eighth amendment requirement for consistent application of capital sentencing. The effect of the lower court's decision is to disregard the limitations of Zant and Barclay and to completely open-end the penalty trial.

Accordingly there were no other safeguards in the jury proceedings that served to confine the jury's discretion so as to substitute for the key safeguard that was omitted. The penalty proceedings in this case were in a true sense open-ended completely. The procedures sanctioned by the lower court decision are indeed very broad, permitting an unchecked license to present and consider anything at all, while at the same

permitting the jury to base its death verdict solely upon non-statutory aggravating factors -- a procedure said by the Court in Zant and Barclay to be unconstitutional.

The Court should grant certiorari to review the significant question as to the limits on capital sentencing discretion allowed by the eighth and fourteenth amendments. As it now stands, the Henry decision sanctions a process virtually without limits and the absence of a safeguard deemed constitutionally necessary by the Court. It is a question of broad reach affection the administration of capital punishment in Florida and elsewhere. The Court is the only court that can resolve the now open question.

CONCLUSION

Significant eighth and fourteenth amendment questions are presented by this case, each of which involve the proper application of the Court's precedent. Because the lower court has resolved those questions in a manner that misperceives the Court's decisions, review by the Court is required. The petition for a writ of certiorari must be granted.

Respectfully Submitted,

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APPENDIX A

APPENDIX A

JUDGMENT BELOW

James Dupree HENRY, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent-Appellant, Cross-Appellee.

No. 80-5184.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Dec. 13, 1983.

After the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., granted petition for writ of habeas corpus, the Court of Appeals, 661 F.2d 56, affirmed, and denied rehearing en banc, 669 F.2d 731. The United States Supreme Court, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, vacated and remanded. On remand, the Court of Appeals, 686 F.2d 311, affirmed. The United States Supreme Court, 103 S.Ct. 3566, granted certiorari and vacated and remanded judgment. On remand, the Court of Appeals, James C. Hill, Circuit Judge, held that: (1) trial court properly relied on nonstatutory aggravating factors in imposing death sentence; (2) error in failing to instruct jury that aggravating circumstances must be found beyond reasonable doubt was harmless; and (3) application of Florida aggravating circumstance that the crime was especially heinous, atrocious or cruel, was not improper in view of vile and atrocious acts committed by petitioner upon his victim and before his victim's death.

Affirmed in part and reversed in part.

1. Homicide ⇐354

Actions of petitioner in resisting arrest and shooting police officer as officer knelt on ground begging not to be shot again were not constitutionally protected conduct, and thus evidence of those actions was admissible as clearly having a material bear-

* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452, October 14, 1980.

ing on character of defendant, and therefore could be relied upon as a nonstatutory aggravating circumstance in imposing death penalty.

2. Criminal Law ⇐1208.1(6)

Procedure followed in petitioner's case under Florida law, where judge is sentencing authority and jury acts only in advisory capacity, returning general verdict recommending life or death, where both judge and jury heard substantial evidence of statutory aggravating factors, and judge specifically found statutory aggravating factors to be present, supported finding that petitioner's death sentence did not rest solely on a nonstatutory factor so as to preclude consideration of such factor in imposing sentence.

3. Habeas Corpus ⇐85.5(15)

Record demonstrated that trial judge allowed jury, in imposing sentence, to consider all mitigating circumstances "included but not limited to" statutory circumstances, and judge specifically found that as to mitigating circumstances, there were absolutely none, refuting petitioner's contention that trial judge improperly considered only statutory mitigating circumstances.

4. Habeas Corpus ⇐30(3)

That state Supreme Court did not affirmatively pass on issue whether it was error to consider nonstatutory aggravating circumstance in imposing death sentence did not invalidate such sentence.

5. Habeas Corpus ⇐30(1)

For failure to give instruction to be harmless, evidence must be so overwhelming that omission beyond reasonable doubt did not contribute to verdict.

6. Habeas Corpus ⇐30(1)

Error in failing to instruct jury that aggravating circumstances must be found beyond reasonable doubt was harmless, as evidence of aggravating circumstances was overwhelming, jury never heard an instruction during trial on any standard of proof other than beyond reasonable doubt, and, in Florida, judge, not jury, imposes final sentence.

7. Criminal Law ⇐1208.1(6)

That jury, which returned general verdict of guilty in prosecution charging petitioner with both murder with intent to kill and felony-murder, did not specifically find that petitioner intentionally killed victim did not preclude sentencing petitioner to death, where petitioner bound and gagged his victim, tortured him and cut him with a razor blade, victim died by strangling on gag petitioner placed in his mouth, and petitioner could not argue that he did not perform fatal act with intent at least to seriously and wantonly harm victim.

8. Criminal Law ⇐641.13(2)

Failure to instruct jury that aggravating circumstances must be found beyond reasonable doubt was harmless error, and therefore petitioner was not denied effective assistance of counsel on ground that his attorney did not object to trial judge's charge. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(2)

Notwithstanding that under state law, instruction allowing consideration of nonstatutory aggravating factors in imposing death sentence was erroneous, petitioner's counsel was not ineffective for failing to object to that charge, as instruction did not constitute constitutional error. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

Constitution does not mandate error-free counsel.

11. Criminal Law ⇐1208.2

Sentencing authority has discretion in deciding whether to impose death penalty.

12. Homicide ⇐354

Trial judge's reliance on aggravating circumstance, murder while committing robbery, did not result in automatic imposition of death penalty, as it was not unconstitutional for state of Florida, in constructing death sentencing procedure, to consider murders committed in course of other dangerous felonies to be reprehensible, nor did use of underlying felony shift burden of proof to defendant; rather, state had to

nevertheless prove existence of aggravating circumstances.

13. Habeas Corpus ⇐30(3)

State law error that trial judge in regarding aggravating circumstances of murder in commission of robbery and murder for pecuniary gain as separate and distinct aggravating circumstances did not raise possibility that death sentence was not imposed in a consistent rational manner, as record gave no indication that sentencing judge considered it important that same facts supported two statutory provisions; therefore, that error did not render death sentence invalid.

14. Criminal Law ⇐1208.1(6)

There was no constitutional error in trial judge's imposition of death sentence immediately after jury recommended life sentence, as judge expressly stated on record that he had carefully considered case for some time and felt prepared to rule without delay.

15. Criminal Law ⇐1147

Florida court's methods of review, employing a standard of review in cases in which jury recommends sentence of life of whether facts supporting death sentence are so clear and convincing that virtually no reasonable person could differ, while not employing clear and convincing standard when jury recommends death, are constitutionally valid.

16. Habeas Corpus ⇐92(1)

It is not function of Court of Appeals to legislate state laws and procedures; it only evaluates the constitutional attacks upon them.

17. Criminal Law ⇐1208.1(4)

Even if in county in which petitioner was sentenced, 16.3% of all capital indictments resulted in death sentence and 41.7% of all convictions resulted in death sentence, while statewide percentages were 9.7% and 24.3% respectively, there was no constitutional violation, as petitioner alleged no racial, sexual or other inherently suspicious discrimination, did not argue that death penalty was somehow unsuited in his particular case, and did not raise a claim that Florida court failed properly to conduct a proportionality review, but claimed only that Florida death penalty was arbitrary and capricious as applied.

18. Homicide ⇐354

Application of Florida aggravating circumstance that the crime was especially heinous, atrocious or cruel, was not improper in view of vile and atrocious acts committed by petitioner upon his victim and before victim's death. West's F.S.A. § 921.141(5)(h).

Wallace E. Allbritton, Charles A. Stampelos, Tallahassee, Fla., for respondent-appellant, cross-appellee.

Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, Fla., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HILL, HENDERSON and SMITH **, Circuit Judges.

JAMES C. HILL, Circuit Judge:

In this case, we review the order of the district court granting appellee James Dupree Henry's petition for a writ of habeas corpus. This panel previously decided and affirmed this case sitting as the United States Court of Appeals for the Fifth Circuit (Unit B), *see Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981) (*Henry I*), and Wainwright appealed to the Supreme Court. The Supreme Court vacated and remanded the case for further consideration in view of *Engle v. Isaac*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), and, in *Henry*

** Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

v. Wainwright, 686 F.2d 311 (5th Cir.1982) (*Henry II*), we reinstated our previous judgment. Wainwright appealed again to the Supreme Court, which vacated and remanded the case again, this time for reconsideration in light of *Barclay v. Florida*, —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Upon reconsideration, we have determined that the decision in *Barclay* demonstrates that our previous decision was in error. After considering the issues raised by Henry on cross appeal not passed on in our previous decisions, we conclude that the district court properly denied relief as to those issues. Therefore, we affirm the judgment of the district court denying the writ as to the additional issues and reverse the judgment of the district court granting relief on the *Barclay* issue.[1]

I

In *Henry I*, 661 F.2d at 56, we concluded that it is Constitutional error for the sentencing authority to consider nonstatutory aggravating factors in determining whether to impose the death penalty. In *Barclay*, the Supreme Court clearly held that the Constitution does not prohibit the sentencing judge from considering nonstatutory aggravating circumstances in all cases. 103 S.Ct. at 3427 (plurality opinion); 103 S.Ct. at 3437 (Stevens and Powell, JJ., concurring). In that case, the trial judge found valid statutory aggravating circumstances but no mitigating circumstances. The Supreme Court held it proper for the Florida Supreme Court to conclude in such a case that the reliance of the sentencing judge on the nonstatutory aggravating circumstance was harmless error. *Id.* 103 S.Ct. at 3428, 3433.

Henry contends that distinctions between the present case and *Barclay* require that we invalidate his death sentence. He first argues that in *Barclay* and in *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the sentencing authority considered evidence properly before it but erroneously concluded that the evidence supported a finding of a statutory aggravating circumstance. Henry contends that the trial judge in this case relied on inadmissible evidence. Henry cites *Ford v. Strickland*, 696 F.2d 804, 814 (11th Cir.1983) (en banc), *Antone v. Strickland*, 706 F.2d 1534 (11th Cir.1983), *Shriner v. Wainwright*, 715 F.2d 1452 (11th Cir.1983), and *Brooks v. Francis*, 716 F.2d 780 (11th Cir.1983) to support his contentions.

These cases do not support the result advocated by Henry. *Ford* involved "consideration of neither unconstitutional or nonstatutory aggravating evidence," 696 F.3d at 814, and *Antone* involved a similar situation, 706 F.2d at 1539. In *Brooks*, the jury (the sentencing authority in Georgia) did not rely on a nonstatutory circumstance; the petitioner challenged the trial court's instruction allowing the jury to "consider all the evidence received throughout this trial." At 790. This court denied relief on the basis of the *Henry II* decision, 686 F.2d 311, without citing *Barclay* or *Stephens*. And, in *Shriner*, we squarely rejected a claim similar to Henry's, relying directly on *Barclay*. 715 F.2d at 1458.

In *Barclay*, the Supreme Court stated that the evidence supporting the finding of the nonstatutory aggravating circumstance was "properly introduced to prove that the mitigating circumstance of the absence of a criminal record did not exist." 103 S.Ct. at 3427. The Court in *Barclay* did not rely heavily on the coincidence that the evidence was properly admissible under state law, however. The Supreme Court also considered the sentencing review by the Florida Supreme Court,[2] the existence of valid statutory aggravating circumstances, and the absence of mitigating circumstances. Indeed, Justice Stevens, concurring, stated that "[t]he Florida rule that statutory aggravating factors must be exclusive affords greater protection than the federal Constitution requires." *Id.* 103 S.Ct. at 3432–33.

1. The facts and procedural background have adequately been set forth in our previous decisions and we will not repeat them here.

2. Henry does not contend that the review was somehow inadequate in this case.

[1] To accept Henry's argument would create an anomaly: the sentencing authority could constitutionally consider nonstatutory aggravating circumstances only if the evidence supporting those circumstances had validly been admitted on some other ground. This result would contradict the clear language in *Barclay* that "the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." *Id.* 103 S.Ct. at 3433 (Stevens, J., concurring). Although the Court clearly prohibited any evidence of aggravating acts drawn from or based on constitutionally protected conduct, *see* 103 S.Ct. at 3427, Justice Stevens' comments indicate that Henry overemphasizes the Court's reliance on the admissibility of the evidence at Barclay's trial simply to show the absence of a mitigating circumstance. In this case, the nonstatutory aggravating circumstance relied on by the judge was Henry's resisting arrest and shooting a police officer as the officer knelt on the ground begging not to be shot again. Henry's actions clearly have a material bearing on the character of the defendant, and the actions are not constitutionally protected conduct. This is enough to render the evidence constitutionally "admissible" under *Barclay*.

[2] Henry also argues that this case differs from *Barclay* because the possibility exists that the jury relied "*solely* on a nonstatutory aggravating factor." 103 S.Ct. at 3433 (Stevens, J., concurring) (emphasis in original). Henry's judge instructed the jury that they should consider all aggravating circumstances "not limited to" statutory circumstances. The jury recommended by a vote of 7–5 that Henry be sentenced to death, and the trial judge sentenced Henry to death. It is impossible to determine what evidence the jury relied on in sentencing Henry to death. In *Barclay*, however, Justice Stevens referred to a "death sentence" resting "*solely* on a nonstatutory ... factor," *id.*; he did not directly[3] address whether the jury as well as the judge must specifically find a statutory aggravating factor to be present. In Florida, the judge is the sentencing authority, and the jury acts only in an advisory capacity, returning a general verdict recommending life or death. Both the judge and jury heard substantial evidence of statutory aggravating factors in this case, and the judge specifically found statutory aggravating factors to be present. This procedure provides us adequate assurance that Henry's sentence does not rest solely on a nonstatutory factor.

[3] Next, Henry argues that the trial judge improperly considered only statutory mitigating circumstances;[4] however, the record does not support Henry's contention. Here the trial judge allowed the jury to consider all mitigating circumstances "included but not limited to" statutory circumstances, and the judge specifically found that as to "mitigating circumstances, there are absolutely none." In any event, Henry's attempt to distinguish *Barclay* in this manner, in reliance on our decision in *Goode v. Wainwright*, 704 F.2d 593, 612 (11th Cir. 1983), is now of doubtful merit. The Supreme Court recently reversed *Goode*. *Wainwright v. Goode*, — U.S. —, 104 S.Ct. 378, 77 L.Ed.2d — (1983).

[4] We must address one final question in deciding the effect of *Barclay* on this case. In *Barclay*, the Supreme Court relied on the review conducted by the Florida Supreme Court in refusing to invalidate Barclay's sentence. *See* 103 S.Ct. at 3423. In this case, although Henry presented the nonstatutory aggravating circumstances is-

3. In *Barclay* the jury voted 7–5 for life imprisonment. 103 S.Ct. at 3421. The trial judge's finding of an aggravating factor in *Barclay* provided a sufficient safeguard to allow imposition of the death penalty; we cannot discern a reason for invalidating the death sentence here when the sole distinction is that a jury voted *for* the death penalty.

4. Henry raised this issue in his initial cross-appeal as an independent ground of error. *See Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978).

sue to the Florida Court, that Court did not affirmatively pass on it. *Henry II*, 686 F.2d at 311. Nevertheless, this affords no reason for invalidating the sentence. In *Barclay*, the Florida Court also "never discussed the trial judge's specific findings concerning Barclay." *Barclay*, 103 S.Ct. at 3441 (Brennan, J., dissenting); *see generally Barclay v. State*, 343 So.2d 1266 (Fla.1977). In both cases the Florida Court simply conducted its sentencing review and concluded that the trial judge acted properly. We can find no distinction on this ground between this case and *Barclay*. Thus, we reverse the order of the district court granting Henry the writ of habeas corpus because of the trial judge's reliance on nonstatutory aggravating factors.

II

[5, 6] On cross appeal, Henry first contends that the district judge erred in finding harmless the failure of the trial judge to instruct the jury that aggravating circumstances must be found beyond a reasonable doubt. For the failure to give the instruction to be harmless, the evidence must be so overwhelming that the omission beyond a reasonable doubt did not contribute to the verdict. *See, e.g., Brooks v. Francis*, 716 F.2d 780 at 794 (11th Cir.1983). The district judge accurately noted that the evidence of the aggravating circumstances (murder while committing robbery, especially heinous and cruel murder, and pecuniary gain) was overwhelming. The jury never heard an instruction during the trial on any standard of proof other than beyond a reasonable doubt. And, in Florida, the judge, not the jury, imposes the final sentence. We conclude that the judge's failure to repeat his charge to the jury on the standard of proof could not have harmed Henry.[5]

III

The trial judge charged the jury on both murder with intent to kill and felony murder; the jury returned a general verdict of guilty. Henry therefore contends that, because the jury failed specifically to find that he intentionally killed the victim of the murder, he cannot be constitutionally sentenced to death. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We recently addressed this type of claim in *Ross v. Hopper*, 716 F.2d 1528 (11th Cir.1983). *Ross* is particularly helpful in resolving Henry's claim.

In *Ross*, the petitioner also claimed that he could not be sentenced to death on the basis of a felony murder conviction, citing *Enmund*. We noted that in *Enmund* the evidence did not demonstrate that Enmund participated in the killing. It appeared that all Enmund had done was to drive the getaway car. *See* 102 S.Ct. at 3378. In *Ross*, the evidence demonstrated that the petitioner fired the fatal shot; we therefore concluded that he could constitutionally be sentenced to death even though he was not charged with intent-to-kill murder. At 1533.

[7] The same is true in this case. Henry bound and gagged his victim, tortured him, and cut him with a razor blade. The victim died by strangling on the gag Henry placed in his mouth. Henry claims that he did not intend that the victim die. He cannot argue, however, that he did not perform the fatal act with intent at least to seriously and wantonly harm the victim. He had no accomplice. Thus, *Enmund* is no bar to the death sentence here.

IV

[8] Henry next claims that he was denied effective assistance of counsel at his sentencing hearing. First, he notes that his attorney did not object to the trial judge's charge, which failed to instruct the jury that aggravating circumstances must be found beyond a reasonable doubt. We have concluded that the failure of the judge to give this instruction was harmless beyond a

5. This is not a case in which the judge refused to give the charge; Henry's counsel never requested it.

reasonable doubt. *See supra* § II. In *Washington v. Strickland*, 693 F.2d 1243 (11th Cir.1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983), we set forth a two-part test for ineffective assistance claims. The petitioner must show both ineffective assistance and prejudice. 693 F.2d at 1258. Here, Henry was not prejudiced because the failure to give the instruction was harmless beyond a reasonable doubt. We therefore reject this claim.

[9, 10] Henry also claims that his counsel was ineffective because he failed to object to the jury charge allowing consideration of nonstatutory aggravating factors. Although this instruction, under *Barclay*, does not constitute constitutional error, *see supra* § I, it was erroneous under state law. Nevertheless, the failure to object did not deprive Henry of his right to "reasonably effective" counsel under the circumstances. *See Washington*, 693 F.2d at 1250. The Constitution does not mandate error-free counsel. Given that the judge's reliance on the nonstatutory factor is constitutional under *Barclay*, we think it would be anomalous to hold the failure of Henry's counsel to object to the charge to be unconstitutional assistance.

V

[11, 12] Henry next contends that various constitutional deficiencies in his sentencing proceeding rendered that proceeding unreliable, standardless, and arbitrary. *See generally Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). First, Henry argues that reliance by the trial judge on the § (5)(d) aggravating circumstance, murder while committing robbery, resulted in the automatic imposition of the death penalty in his case. This argument has no merit. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. *See Barclay*, 103 S.Ct. at 3431 (Stevens, J., concurring). It is certainly not unconstitutional for the state of Florida, in constructing a death sentencing procedure, to consider murders committed in the course of other dangerous felonies to be reprehensible. Nor, as Henry argues, does the use of the underlying felony shift the burden of proof to the defendant: the state must nevertheless prove the existence of aggravating circumstances. The Supreme Court has held the Florida statute constitutional. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Henry raises no argument here that convinces us that this case is not controlled by *Proffitt*.

[13] Second, Henry argues that the trial judge improperly regarded the aggravating circumstances of murder in the commission of a robbery and murder for pecuniary gain as separate and distinct aggravating circumstances in violation of *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Henry's reading of *Provence* is correct as a matter of state law. We believe, however, that the decision of the Supreme Court in *Barclay*, —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), controls our resolution of this issue for the reasons set forth in section I, *supra*. The trial judge found no mitigating circumstances, and we cannot conclude that the state-law error by the trial judge raised the possibility that the death sentence in this case was not "imposed in a consistent rational manner." *Id.* 103 S.Ct. at 3429 (Stevens, J., concurring). The record gives no indication that the sentencing judge considered it important that the same facts supported two statutory provisions. We therefore reject Henry's claim on this ground.

[14] Henry's final contention also does not convince us that his sentencing hearing was unreliable and arbitrary. He contends that the trial judge erred by imposing the death sentence immediately after the jury recommended a life sentence. The judge in this case expressly stated on the record that he had carefully considered the case for some time and felt prepared to rule without delay. This is not constitutional error.[6]

6. In this section of his brief, Henry also raised the claim that the trial judge improperly con-

VI

Henry's final claim also rests essentially on the argument that he was arbitrarily sentenced to death. He contends that the Florida Supreme Court's appellate review was improper, that the death penalty has been disproportionally applied in his case, and that the aggravating circumstances relied on by the trial judge are unconstitutionally vague.

A. *The Florida Supreme Court Review.*

In reviewing cases in which the jury recommends a sentence of life, the Florida Supreme Court employs a standard of review of whether the facts supporting the death sentence are "so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). The Florida Court apparently does not employ the clear and convincing standard when the jury recommends death. In this case, seven jurors voted in favor of the death penalty and five voted against it; Henry claims that, given the close vote, the distinction drawn by the Florida Court for the purposes of selecting the standard of appellate review is unconstitutional.

The state, citing *LeDuc v. State*, 365 So.2d 149 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), argues that the standards of review do not differ significantly[7] and that in each case the Florida Court simply follows a rule of giving weight to the recommendation of the jury. We need not, however, engage in an examination of the fine points of the standard of appellate review used by the Florida Supreme Court. In *Proffitt v. Florida*, 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913 (1976), and *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 3426–27, 77 L.Ed.2d 1134 (1983), the Supreme Court of the United States expressly noted that the Florida Court applies arguably different standards of review depending on the recommendation of the jury; however, in both cases the Court implied that the Florida Court's review is constitutional. Although the Supreme Court did not address the specific issue before us, it directly relied on the Florida Court's review both to uphold the constitutionality of the Florida statute, *Proffitt*, and to uphold the constitutionality of the sentencing judge's reliance on a non-statutory aggravating circumstance, *Barclay*.

[15, 16] Given the Supreme Court's reliance on the Florida Court's methods of review, we conclude that the Court finds those methods constitutionally valid. It is not unreasonable for the Florida Court to scrutinize cases in which the trial judge ignores the jury's recommendation of a life sentence under a different standard from other cases. Henry does not argue that the Florida Court's review of his sentence was inadequate, and it appears that in every case the Florida Court conducts a meaningful review. It is not the function of this court to legislate state laws and procedures; we only evaluate constitutional attacks upon them. *See Moore v. Balkcom*, 716 F.2d 1511 at 1517 (11th Cir.1983) (giving deference to state court procedures). Under this standard, the Florida Supreme Court's review certainly affords Henry no basis for relief.

B. *Disproportionate Application.*

[17] Henry argues that statistics introduced by him at the district court show that the death penalty has been applied in a discriminatory manner because, in Orange County, 16.8% of all capital indictments result in a death sentence and 41.7% of all convictions result in a death sentence, whereas the statewide percentages are 9.7% and 24.3% respectively. This assertion is without merit for two reasons.

sidered only statutory mitigating circumstances. We have considered and rejected this claim above. *See supra* § I.

7. The Florida Court in *LeDuc* stated:
> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

365 So.2d at 151.

First, in the district court, John Fosnacht, administrative officer in charge of records at the Orange County courts, testified that the statistics relied on by Henry are based on erroneous data. According to Fosnacht, when accurate data is used, the Orange County percentages are 13.2% and 26.9%, respectively. The district court relied on Fosnacht's testimony to conclude that the death penalty is not disproportionately applied in Orange County.[8] The district court's conclusion—with which we agree—alone requires that we reject Henry's claim.[9]

Even if Henry's statistics were accurate, however, there would be no constitutional violation in this case. Henry alleges no racial, sexual or other inherently suspicious discrimination, and he does not argue that the death penalty is somehow unsuited in his particular case. He does not raise a claim that the Florida Court has failed properly to conduct a proportionality review. In essence, he claims only that the Florida death penalty is arbitrary and capricious as applied, and we have rejected that argument. *See Spinkellink v. Wainwright*, 578 F.2d 582, 612–16 (5th Cir.1978).

Recently, in *Maggio v. Williams*, — U.S. —, 104 S.Ct. 311, 77 L.Ed.2d — (1983), the Supreme Court refused to review a claim that the Louisiana Supreme Court's proportionality review is inadequate because the Louisiana Court makes comparisons only on a district-wide basis.[10] The Supreme Court decided that the issue presented by the Fifth Circuit's ruling against Williams does not warrant a writ of certiorari and vacated Williams' stay of execution. If anything, the issue in *Maggio* is more difficult than in this case: by deciding against Williams (in effect), the Court strongly indicated not only that the death penalty may be applied differently from county to county, but that the state supreme court need not review those differing applications to determine whether they are disproportionate. We therefore reject Henry's claim.

C. *Vague Application of Aggravating Circumstances.*

[18] Henry argues that the following Florida aggravating circumstances—"especially heinous, atrocious, or cruel," Fla.Stat. Ann. § 921.141(5)(h), "created a great risk of death to many persons," § 921.141(5)(c), and "for the purpose of avoiding ... a lawful arrest," § 921.141(5)(e)—have been applied arbitrarily and capriciously in Florida. The application of the second and third circumstances is not material: the trial judge did not rely on the § (5)(c) and § (5)(e) factors in this case. We also find no merit in Henry's claim based on the § (5)(h) factor. We have read the cases that, according to Henry, show uneven application of that factor, and we do not find that they support Henry's contention. For example, in *Halliwell v. State*, 323 So.2d 557 (Fla.1975), a case in which the Florida Court invalidated a trial judge's finding of the § (5)(h) factor, the heinous and atrocious acts occurred after death; *Halliwell* therefore was a proper case in which to disallow reliance on the § (5)(h) factor. After reviewing the Florida cases, we find nothing improper in the action of the Florida Court.

Henry also cannot successfully argue that the application of the § (5)(h) circumstance in this case is unconstitutional. The vile and atrocious acts committed by Henry upon his victim and before his victim's death clearly afford a sufficient basis to support a finding based on § (5)(h) in this case. *See Burger v. Zant*, 718 F.2d 979 at 982–87, Slip Op. at 308–14 (11th Cir.1983) (upholding application of similar § (b)(7) circumstance as applied in Georgia).

The judgment of the district court is AFFIRMED in part and REVERSED in part.

8. Henry does not argue that the district court's findings concerning the accuracy of his statistics are erroneous.

9. In any event, Henry's statistics appear to be inadequate. For example, they do not account for differences in the types of murders committed by reference to the presence or absence of aggravating and mitigating circumstances.

10. The Court addressed the issue in deciding to vacate a stay issued by the Fifth Circuit Court of Appeals.

APPENDIX B

APPENDIX B

[ORDER ON REHEARING]

IN T UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 80-5184

JAMES DUPREE HENRY,

Petitioner-Appellee,
Cross Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Dept. of Corrections,

Respondent-Appellant,
Cross-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/13/83, 11 Cir., 198_, ____F.2d____).

Before HILL, HENDERSON and SMITH**, Circuit Judges.

PER CURIAM:

**Hon. Edward C. Smith, U. S. Circuit Judge for the Federal Circuit, sitting by designation.

ORDER RECALLING MANDATE AND
ORDER DENYING PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

I.

The motion of JAMES DUPREE HENRY for recall of the mandate issued upon our judgment and opinion of December 13, 1983 is before us. The motion points out that our mandate issued with the opinion and was not held in this court in the usual fashion (Rule 27(d), Rules of the United States Court of Appeals for the Eleventh Circuit) for 21 days following the release of the court's opinion and for 7 days following denial of a motion for rehearing. The premises considered, it is ORDERED that the mandate be recalled and remain in this court as if it had not issued. The issuance of the mandate is not stayed. In view of the order in paragraph II, below, it is expected that it will issue seven (7) days after the date of this order.

II.

The Petition for Rehearing on behalf of JAMES DUPREE HENRY is DENIED and no member of this panel nor other Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

James C. Hill

United States Circuit Judge

APPENDIX C

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Florida Statutes (1973)

782.04 Murder.—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

No. 83-6430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

JAMES DUPREE HENRY,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc.,
Respondents.

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, JAMES DUPREE HENRY, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

_____

_____

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received._____

_____

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [X]

b. Rent payments, interest or dividends? Yes [ ] No [X]

c. Pensions, annuities or life insurance payments? Yes [ ] No [X]

d. Gifts or inheritance? Yes [ ] No [X]

e. Any other sources? Yes [ ] No [X]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [X] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

STATE OF FLORIDA)

COUNTY OF BRADFORD)

JAMES DUPREE HENRY being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

James D Henry
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 4 day of April, 1984.

Bernice Hannigan
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987

My Commission Expires:

No. 83-6430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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JAMES DUPREE HENRY,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc.,
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I further swear that the responses which I have made to questions and instructions below are true.

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_____

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received._____

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"I declare under penalty of perjury that the foregoing is true and correct."

STATE OF FLORIDA)

COUNTY OF BRADFORD)

JAMES DUPREE HENRY being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

James D Henry
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 4 day of April, 1984.

Bernice Hannigan
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987

My Commission Expires: